UOB Kay Hian Pte Ltd v MA Boon Lan

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(M)-2016 OF 2011
ABDUL WAHAB PATAIL, ZAHARAH IBRAHIM AND MOHAMAD ARIF JJCA
9 APRIL 2013

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Civil Procedure — Damages — Assessment of damages — Failure to plead loss and damage suffered — Whether order for assessment of damages may be obtained despite failure to plead — Whether valid order existed for damages to be assessed

C

Civil Procedure — Pleadings — Issue not pleaded — Failure to plead loss and damage suffered — Whether fatal — Heads of damages a matter of law — Whether order for assessment of damages may be obtained despite failure to plead

D

The appellant/judgment creditor ('JC') appealed against the decision of the judicial commissioner who had: (i) dismissed the JC's appeal to the judge in chambers ('judge') against the deputy registrar's ('DR') decision to dismiss the JC's preliminary objections in relation to an application for assessment of damages; and (ii) dismissed the JC's appeal to the judge against the DR's decision in allowing the assessment of damages in the sum of RM115,484.45. The issues raised in this appeal revolved upon the argument that the respective orders were a nullity because there was no judgment. The respondent submitted that: (a) there cannot be an assessment of damages without there first being an order granted by a court having the power or jurisdiction to do so, that the damages be assessed; (b) a party is bound by its pleadings, and assessment of damages is not pleaded, no order for assessment of damages can be granted; (c) no party can improve on its pleadings by affidavit; and (iv) a nullity will always remain a nullity.

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Held, dismissing the appeal with costs:

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(1) Although loss and damage suffered is a question of fact, the fact that it is not pleaded is fatal only as to an immediate order of damages to be paid, but is not fatal to obtaining an order for assessment of damages. The heads of damages is a matter of law and may be argued at the court hearing the issue of liability, or may be settled by the parties at the stage of assessment of damages. Civil procedure does not require the law to be pleaded. Every counsel is expected to know his law (see para 12).

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(2) It is bad law that having decided there is liability to say that the court cannot give a remedy by an order that the damages be assessed (see para 13).

(3) The court agreed with the High Court that the DR was merely carrying out the assessment of damages pursuant to the order made by the judge on 12 December 2005. He was in no position to override the order of the judge. When the notice of appointment of assessment of damages was fixed for hearing on 22 September 2008, the plaintiff had not filed suit 22–19 of 2009 for a declaration that it was a nullity. Assuming that suit 22–19 of 2009 had been filed, the DR could not in any event set aside the order of the judge made on 12 December 2005 and there was no application by the plaintiff to stay the assessment of damages pending the hearing of suit 22–19 of 1990. Therefore, the DR did not err to dismiss the preliminary objection. The appellant decided not to take part in the assessment of damages and there was nothing wrong in the DR in proceeding to hear the assessment of damages in the absence of the appellant (see paras 16–17).

[Bahasa Malaysia summary

Perayu/pemiutang penghakiman ('JC') merayu terhadap keputusan pesuruhjaya kehakiman yang telah: (i) menolak rayuan JC kepada hakim dalam kamar ('hakim') terhadap keputusan timbalan pendaftar ('TP') untuk menolak bantahan awal JC berkaitan penaksiran ganti rugi; dan (ii) menolak rayuan JC kepada hakim terhadap keputusan TP dalam membenarkan penaksiran ganti rugi dalam jumlah RM115,484.45. Isu yang dibangkitkan di dalam rayuan ini berkisar atas hujahan bahawa perintah masing-masing adalah batal kerana tidak terdapat penghakiman. Responden berhujah bahawa: (a) tidak patut terdapat penaksiran ganti rugi tanpa pertamanya terdapat perintah diberikan oleh mahkamah yang mempunyai kuasa atau bidang kuasa berbuat sedemikian, bahawa ganti rugi ditaksirkan; (b) pihak terikat oleh plidingnya, dan penaksiran ganti rugi tidak diplidkan, tiada perintah penaksiran ganti rugi boleh diberikan; (c) tiada pihak boleh memperbetulkan plidingnya dengan afidavit; dan (iv) pembatalan akan kekal sebagai pembatalan.

Diputuskan, menolak rayuan dengan kos:

(1) Walaupun kerugian dan ganti rugi yang ditanggung adalah persoalan fakta, fakta bahawa ia tidak diplidkan adalah serius hanya kepada perintah segera ganti rugi yang kena dibayar, tetapi tidak serius kepada mendapatkan perintah untuk penaksiran ganti rugi. Kepala ganti rugi adalah perkara undang-undang dan mungkin dihujahkan di mahkamah yang mendengar isu liabiliti, atau boleh diselesaikan oleh pihak di peringkat penaksiran ganti rugi. Prosedur sivil tidak memerlukan undang-undang diplidkan. Setiap peguam dijangka mengetahui undang-undangnya (lihat perenggan 12).

(2) Adalah undang-undang tidak betul bahawa setelah memutuskan terdapat liabiliti untuk menyatakan mahkamah tidak boleh memberi remedi dengan perintah bahawa ganti rugi ditaksirkan (lihat perenggan 13).

(3) Mahkamah bersetuju dengan Mahkamah Tinggi bahawa TP hanya menjalankan penaksiran ganti rugi berikutan perintah yang dibuat oleh hakim pada 12 Disember 2005. Beliau tidak boleh menolak perintah hakim. Apabila notis masa penaksiran ganti rugi ditetapkan untuk pendengaran pada 22 September 2008, plaintif tidak memfailkan guaman 22–19 Tahun 2009 untuk perisytiharan bahawa ia adalah pembatalan. Menganggap bahawa guaman 22–19 Tahun 2009 difailkan, TP tidak dalam apa keadaan sekalipun mengetepikan perintah hakim yang dibuat pada 12 Disember 2005 dan tiada permohonan oleh plaintif untuk menangguhkan penaksiran ganti rugi sementara menunggu pendengaran guaman 22–19 Tahun 1990. Oleh itu, TP tidak tersilap untuk menolak bantahan awal tersebut. Perayu memutuskan untuk tidak mengambil bahagian dalam penaksiran ganti rugi dan tidak ada kesalahan dalam TP dalam meneruskan untuk mendengar penaksiran ganti rugi tanpa kehadiran perayu (lihat perenggan 16–17).]

Notes

For cases on assessment of damages, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2610–2634.

For cases on issues not pleaded, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6485–6494.

Cases referred to

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (refd)

State Government of Perak v Muniandy [1986] 1 MLJ 490, SC (refd)

United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206, FC (refd)

Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan [1987] 1 MLJ 393, SC (refd)

Appeal from: Civil Suit No MR 83 of 1987 and Applications for Execution Nos 36–01 of 2005 (MR) and 36–04 of 2010 (MR) (High Court, Miri)

Tai Choi Yu (Tai Choi Yu & Co) for the appellant.

Louis Achuk (Antonio Sim and Jason Wong Seng Ho with him) (Kadir, Wong, Lin & Co) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] By its notice of appeal, the judgment creditor UOB Kay Hian Pte Ltd ('the appellant') appealed against the decision of the judicial commissioner who had

(a) dismissed the judgment creditor's appeal to the judge in chambers against

A the deputy registrar's decision to dismiss the judgment creditor's preliminary objections on the assessment of damages in Application for Execution No 36–01 of 2005(MR);

(b) dismissed the judgment creditor's appeal to the judge in chambers against the deputy registrar's decision to allow judgment debtors assessment of damages in the sum of RM115,484.45 with costs in Application for Execution No 36–01of 2005(MR);

(c) ordered that both dismissals be with costs to be taxed; and

(d) allowed the respondent/execution debtor's summons in chambers in Application for Execution No 36–04 of 2010(MR) with costs to be taxed.

[2] In the appeal before this court, the three issues raised for the appellant revolved upon the argument that the order of 12 December 2005 and 8 February 2006 was a nullity because there was no judgment. It was prayed for the appellant therefore that

(a) the appellant's preliminary objections be allowed;

(b) the purported damages as assessed at RM115,484.85 be set aside; and

(c) the appellant's summons for directions for sale be re-instated for hearing.

[3] The submissions for the respondent however dwelt on elementary principles that:

(a) there cannot be an assessment of damages without there first being an order granted by a court having the power or jurisdiction to do so, that the damages be assessed (*Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (FC));

(b) a party is bound by its pleadings, and assessment of damages is not pleaded, no order for assessment of damages can be granted (*Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 (FC); *State Government of Perak v Muniandy* [1986] 1 MLJ 490 (SC); *Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan* [1987] 1 MLJ 393 (SC));

(c) no party can improve on its pleadings by affidavit (*United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 (FC));

(d) a nullity will always remain a nullity.

[4] The submissions concluded:

9.1. This appeal must be read together with the Civil Appeal No

Q-02(IM)-1910-2010 which centres on the same issue of 'damages to be assessed' where there is NO JUDGMENT.

9.2. The High Court order made on the 12 December 2005 for 'damages to be assessed' is a nullity for the reasons stated above and which said reasons are thoroughly supported by the legal authorities cited.

9.3. In the premises the appellant humbly prays that this appeal be allowed with costs here and below in the following terms:

(a) the appellant's preliminary objections be allowed;

(b) the purported damages as assessed at RM115,484.85 be set aside; and

(c) the appellant's summons for directions for sale be re-instated for hearing.

REASONING AND DECISION

[5] If this appeal must be read together with Civil Appeal No Q-02(IM)-1910 of 2010, there ought to have been an application made for the two appeals to be heard together. Without an order that the appeals be heard together, each appeal must be heard separately and upon its own record. We observe also that although it was submitted for the appellant this appeal must be read together with the other appeal, the records of that appeal was not filed in the record of this appeal. In the event, this appeal will be heard on its merits on its own record of appeal.

[6] Although the law with regard to the reasons rendering an order that is a nullity is clear, the submission must condescend to the facts so as to demonstrate that the reasons are applicable to this case.

[7] We find at p 4 of the written submissions the following:

3.1. The defendant/respondent's counterclaim in Suit No MR 83 of 1987 was dismissed by the Court of Appeal and leave to appeal to the Federal Court was refused.

3.2. There was no pleadings and no particulars of the defendant/respondent's alleged damages which is based on the alleged damages caused by the court setting aside the appellant/plaintiffs prohibitory order: indeed it was also impossible for the respondent/defendant to plead the alleged damages as those alleged damages came after the action was decided by the Court of Appeal on the 8 August 2003 in the execution proceedings.

3.3. The alleged damages were allegedly arose from the abuse of the court process by theplaintiff/appellant in registering the said prohibitory order

and if so, this will require a new legal proceedings and not by an interlocutory application in execution proceedings by summons in chambers.

[8] The acknowledgment it was impossible for the respondent to plead the alleged damages since the damages occurred after the decision on 8 August 2003 leads to the conclusion that the submission 'that there was no pleadings' somewhat hollow.

[9] The requirement of civil procedure is that causes of action and the facts relied upon must be pleaded. The reason is that the other party be given notice and the opportunity

(a) to concede so that he need not be burdened with costs therefore;

(b) to check and verify the cause of action and the facts;

(c) to seek further and better particulars if necessary to defend himself; and

(d) to check and verify the evidence relied upon on disputed facts by interrogatories and discovery.

[10] The purpose is to enable a party to be satisfied that the facts relied upon are true and correctly stated. It facilitates settlement, and if the matter cannot be settled, it facilitates proceeding to trial only on for the hearing of disputed evidence that can and need to be tested before the court so as to determine the weight if any that is to be given to such evidence, before proceeding to a hearing of submissions. In this manner the rules of civil procedure seeks to ensure that as far as is humanly possible, the facts and evidence put before the court for judicial appreciation and decision can safely be taken into consideration and given the weight that is warranted.

[11] If litigation lawyers take all these actions, the record eliminates the injustice of any error, bias or even corruption through the appeal process, or where there is no further appeal, by the review process of that final court.

[12] Although loss and damage suffered is a question of fact, the fact that it is not pleaded is fatal only as to an immediate order of damages to be paid, but is not fatal to obtaining an order for assessment of damages. The heads of damages is a matter of law and may be argued at the court hearing the issue of liability, or may be settled by the parties at the stage of assessment of damages. Civil procedure does not require the law to be pleaded. Every counsel is expected to know his law.

[13] The foregoing explains that the objection on failure to plead is not to be taken too far, beyond what it is adopted for, as a convenient escape. It is bad law

that having decided there is liability to say that the court cannot give a remedy by an order that the damages be assessed.

[14] At para 6, it was submitted that:

> 6.1. Firstly, in order to seek a prayer or remedy in court for 'damages to be assessed' a person must have an actionable case or cause of action by which he can apply to the court for judgment for damages and the said remedy of 'damages to be assessed.
>
> 6.2. A person cannot simply apply to the court for 'damages to be assessed' just because he wishes to do so or presumed he can do so without an actionable case or cause of action either in contract or in tort.
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> 6.3. Secondly, for a claim on 'damages to be assessed' the person claiming must also show particulars of the loss or damage suffered by him and he must prove the said loss and damage that he suffered in order to sustain his claim for 'damages to be assessed.
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> 6.4. In this case, nowhere in the defendant's said statement of fefence and counterclaim did he particularise or lay out the loss and damages suffered by him nor was there any proof before the court that he had actually sustained or suffered the said loss or damages.
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> 6.5. In the absence of any proof of any loss of damages, the defendant has no locus standi or actionable case or cause of action to claim for 'damages to be assessed' and the court has no jurisdiction to entertain the said claim much less to grant an order for 'damages to be assessed' as was done in the impugned order given on the 12 December 2005 and dated 8 February 2006.

[15] The order of 12 December 2005 was appealed to the Court of Appeal. The appeal was dismissed 28 July 2008.

[16] The specific order appealed from is the decision of the High Court made on 16 June 2011. This and the several applications were addressed by the High Court in its ruling. The High Court held:

> 12. I shall now deal with application for execution No 361–2005. In respect of encls 178 and 194, the DR was merely carrying out the assessment of damages pursuant to the order made by the High Court judge on 12 December 2005. He was in no position to override the order of the High Court judge. When the notice of appointment of assessment of damages was fixed for hearing on 22 September 2008, the plaintiff had not filed suit 22-19-2009 for a declaration that it was a nullity. Assuming that suit 22-19-2009 had been filed, the DR could not in any event set aside the order of the judge made on 12-12-2005 and there was no application by the plaintiff to stay the assessment of damages pending the hearing of suit 22-19-1990.

13. Therefore, the DR did not err to dismiss the preliminary objection of the plaintiff. The plaintiff decided not to take part in the assessment of damages and there was nothing wrong in the DR in proceeding to hear the assessment of damages in the absence of the plaintiff. In this appeal there was no complaint by the plaintiff on both the fact and the quantum of damages as assessed by the DR. Therefore the appeal in encl 194 is also dismissed with costs.

[17] Clearly the appellant is seeking to appeal against an assessment of damages that it had decided not to take part in. In the circumstances, we agree with the High Court and dismiss the appeal with costs which unless otherwise agreed is fixed at RM10,000. Deposit to account of costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum